88-1646

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

ERIC LAUPOT, PETITIONER

v.

WILLIAM BERLEY, EXECUTOR OF THE
ESTATE OF HARRY BERLEY, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ERIC LAUPOT,
Petitioner pro se
and one of the
principal heirs to
the Estate of Max
Berley
134-6 Ivy Drive
Charlottesville, Virginia
22901

(804) 295-9540

QUESTION PRESENTED

Whether criminal obstruction of justice, conspiracy to obstruct justice, and racketeering by a United States district court judge, his official court reporter, and his Chief Deputy Clerk, backed up by the entire United States Court of Appeals for the Fourth Circuit, indicate judicial bias towards the defendant(s) in this multi-billion dollar case and therefore constitute, in and of themselves, denial of due process and equal protection to the plaintiff under the fifth amendment to the United States Constitution?

LIST OF PARTIES

Following is a list of parties to this proceeding:

1. Eric Laupot, petitioner pro se (plaintiff-appellant to the United States

Court of Appeals for the Fourth Circuit, the court whose judgment is sought to be reviewed) and one of the principal heirs to the Estate of Max Berley, and

2. William Berley, as Executor of the Estate of Harry Berley, deceased, respondent (Mr. Berley was defendant-appellee in the United States Court of Appeals for the Fourth Circuit). Mr. William Berley is represented by the law firms of SMITH, TAGGART, GIBSON & ALBRO (Attention: Mr. Thomas E. Albro) of Charlottesville, Virginia and STROOCK & STROOCK & LAVAN (Attention: Robert J. Zastrow, Jr.) of New York, N.Y.

Pursuant to Plaintiff's Motion for Leave to Amend Complaint and to Enlarge Time (Vol. III, No. 22 of Record on Appeal in this case) and to Rule 15(a) of the Federal Rules of Civil Procedure, there are two other defendants who should have been added, but were not, to my original com-

plaint by the United States District Court Judge James Harry Michael, Jr. and the United States Court of Appeals for the Fourth Circuit. These are:

3. William Berley, in his individual capacity, and

4. Alexander Berley.

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V.

WILLIAM BERLEY, EXECUTOR OF THE ESTATE OF HARRY BERLEY, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Eric Laupot, one of the principal heirs to the Estate of his late grandfather, Max Berley, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Neither the oral opinion of United States District Court Judge James Harry Michael, Jr. (Appendix C, infra) granting

respondent's motion to dismiss nor the per curiam opinion of the United States Court of Appeals for the Fourth Circuit (Appendix A, infra) is reported.

JURISDICTION OF THIS COURT

1. The judgment of the United States Court of Appeals for the Fourth Circuit (Appendix D, infra) was entered on December 8, 1988.

2. The order of the United States Court of Appeals for the Fourth Circuit (Appendix E, infra) denying Appellant's Petition for Rehearing, With a Suggestion for Rehearing In Banc was entered January 6, 1989.

3. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent text of the Constitutional and statutory provisions involved, which are listed in the Table of Authorities, supra, are set forth more fully in Appendix F, infra.

STATEMENT OF FACTS

My grandfather Max Berley was allegedly murdered 30 years ago by his brothers Harry and Alexander Berley, among others, and his Estate assets (including my inheritance) were thereafter wrongfully converted by his brothers to their own use and benefit.[1] My grandfather had been a wealthy and prom-

[1]Harry and Alexander Berley, together with Max Berley's widow (my grandmother), Rose Berley, served as both Executors and Trustees under the Last Will and Testament of Max Berley. In 1985 Harry Berley and Rose Berley died. The Executors of their Estates are William Berley and David Boris Berley, respectively.

inent real estate broker in New York City for about 40 years prior to the time he was allegedly murdered in 1958, and his estate assets seemed to have consisted primarily of shares of stock in closely-held New York State business corporations which owned real property in New York City, primarily Manhattan. Thus, the inheritance which was wrongfully taken from me consisted principally of businesses. My grandfather's real estate brokerage and management firm, BERLEY & CO., INC., was one of the foremost real estate companies in the City of New York from the 1930's until recently.

For almost 30 years after the alleged murder, Harry Berley (respondent's decedent), in conspiracy with others, threatened Max Berley's widow [my grandmother, Rose Berley - please see her attached Affidavit, sworn to December 15, 1984 (part of Volume I, No. 1 of the Record on Apopeal in this case), as

well as the attached Affidavit of Mary Niedwick, R.N. (also part of Vol. I, No. 1 of Record on Appeal)] if Mrs. Berley told anybody about what had happened. They allegedly forced her to work for them guiding illegal drug shipments into south Florida, and they allegedly forced her to sign fraudulent documents pertaining to my grandfather's Estate and Trust, which they then submitted to the Surrogate's Court in New York County (New York State). For almost 30 years, until 1984, they did not properly inform the heirs to my grandfather's Estate of their inheritance. I myself was under the impression, until 1984, that my grandfather had died broke.

In addition, for at least 22 years, from 1948 until about 1970, Harry Berley and the other conspirators deliberately and willfully failed to file federal income tax returns (as well, presumably, as New York State corporate franchise tax returns)

on at least four closely-held business corporations which were part of my grandfather's Estate and Trust, and which they themselves controlled as corporate officers and directors [please see attached copy of letter dated January 13, 1988 to petitioner from Mr. Thomas V. Chisari, Disclosure Officer at the Internal Revenue Service in Holtsville, New York, as well as attached copy of Affidavit in Reply to Affirmation in Opposition (together with copies of all documents attached thereto), sworn to January 18, 1988 by Eric Laupot - all of which documentation, including the letter from Mr. Chisari and the Affidavit in Reply to Affirmation in Opposition, are part of Volume I, No. 1 of the Record on Appeal]. The real property formerly owned by one of these corporations alone (D & M ESTATES, INC.) is today worth about $19,000,000 (in 1986 the building at 295-307 Lafayette Street, New York, New York - "The

Puck Building" - was sold for an official sales price of $18,750,000), so that the amount of back taxes, interest and penalties now owed the Internal Revenue Service and the New York State government could easily run into many, many millions of dollars. In fact, since there were allegedly many other properties left out of my grandfather's Estate, the amount owed the Internal Revenue Service and the State of New York could run into the hundreds of millions of dollars.

After informing the heirs to my grandfather's Estate of their inheritances in 1984 for the first time, the Trustees (i.e., Harry Berley, Alexander Berley, and Rose Berley) of the Testamentary Trust Fund set up under the Will of my grandfather commenced legal proceedings in the Surrogate's Court of New York County (New York State) to settle

their account as Trustees.[2] In the course of these legal proceedings the Trustees (including William and David Boris Berley, the Executors of the two deceased cotrstees Harry and Rose Berley, respectively) mailed, over a two-year period [from 1984 until 1986 - see page 5 of Affidavit of Eric Laupot, sworn to May 27, 1988, which is Volume III, No. 23 of the Record on Appeal in this case; see also pages 2-4 of Affidavit of Eric Laupot, sworn to June 1, 1988 (Vol. III, No. 26 of Record on Appeal) and page 15 of Transcript

[2]The Trustees (including William and David Boris Berley, Executors of the Estates of deceased cotrustees Harry and Rose Berley, respectively) are represented in the New York proceedings by the following law firms of record:

1. COLLIER, COHEN, SHIELDS & BOCK (formerly known as QUINN, COHEN, SHIELDS & BOCK), New York, N.Y. (Attention: Wallace Bock and Craig M. Shields, Esquires), representing William Berley, Alexander Berley, and David Boris Berley, and

2. ROSS & MATZA, New York, N.Y. (Attention: Leonard M. Ross, Esquire). This firm represents Mr. David Boris Berley only.

And there may, of course, be other law firms, not of record, which are assisting these.

(Vol. IV of Record on Appeal)] numerous fraudulent affidavits and other sworn documents to myself and other members of my immediate family residing in Virginia, including my mother and sister [Note: In its opinion of December 8, 1988 (Appendix A), the Fourth Circuit Court of Appeals erred in stating that the only people so served by the Trustees were myself and my sister (care of my mother). My mother, too, received these documents directly in Virginia under her own name]. These documents were mailed to us voluntarily in Virginia by the Trustees as part and parcel of their scheme to defraud. As explained more fully on pages 18-19 of the Transcript (Vol. IV of Record on Appeal) and pages 3-4 of my "Discrepancies in Defendand's Answering Brief" dated September 15, 1988 (please see copy attached hereto, together with copy of explanatory letter from J.L. Perkins, Deputy Clerk, at the United States Court of Appeals for the Fourth Circuit dated September 21, 1988), no New York State law <u>required</u> the Trustees

to mail these documents to us. They only did so in the hopes that we would sign and return to them fraudulently procured Waivers of Citation, thereby acquiting them forever of all further legal liability and estopping us once and for all from any further legal action against them (acquittal and estoppel).

Thus, the mailings and receipt in Virginia constituted overt acts which occurred in Virginia in furtherance of a criminal conspiracy to willfully and maliciously injure me in my (real estate) businesses (Virginia Code §§ 18.2-499 and 18.2-500), which I inherited from my grandfather and which were supposed to have been held in trust for me. As we shall see below (see pages 25-34, infra), Virginia common law clearly specifies that the conspiracy to injure me in my business, as well as the overt acts in furtherance of the conspiracy (i.e., the fraudulent mailings), took place in Virginia. In addition,

as we shall see below in the section entitled "Legal Background", other acts in furtherance of the conspiracy were committed in Virginia when the conspirators corrupted a United States district court in Charlottesville, Virginia and corruptly influenced that court in various ways.

This case was originally filed in the United States District Court in Charlottesville, Virginia pursuant to 28 U.S.C. § 1332 (Diversity of Citizenship).

All of the aforementioned facts, arguments, and documents were presented by your petitioner to the lower federal courts. Most of them were presented to the New York State courts as well. The defendant William Berley and his alleged conspirators have not directly denied any of the facts presented by me; nor have they themselves presented any affidavits made by those claiming first-hand knowledge of the events involved, in opposition to the charges made by petitioner.

Together with my mother, Janet Laupot, I am one of the principal heirs to the Estate of my grandfather. This Estate, which consists primarily of New York City real estate, may well be worth in the neighborhood of several billion dollars in today's New York City real estate market.

As a matter of public record, my mother and I have made repeated requests to the Trustees for information pertaining to the Estate of my grandfather (copies of documents, names of people involved, etc.) - all to no avail [see, e.g., page 4 of my Motion for a Stay (pertaining to the New York State proceedings) dated July 17, 1988 to the Supreme Court of the United States (Supreme Court Application No. A88-45, which was denied by the full Supreme Court on September 15, 1988 [see Laupot v. Berley, ___ U.S. ___, 109 S. Ct. 21, 101 L. Ed.2d 972, 57 U.S.L.W. 3185]), copy of which Motion for Stay is attached hereto]. The Trustees have therefore refused to provide me with

the documentation and substantiation which I have requested concerning the nature of the trust fund to which I am a beneficiary!

Furthermore, one of the more startling facts about this case is that the defendant(s) would prefer to spend millions of dollars in legal fees rather than simply turn over to me copies of the written records pertaining to my grandfather's estate. If this doesn't prove they're hiding something, then I don't know what does.

LEGAL BACKGROUND

Your petitioner filed a Complaint with the United States District Court in Charlottesville, Virginia on January 29, 1988.[3] Shortly thereafter, Mrs. Virginia

[3] This Complaint was dismissed by Order of the district court entered July 14, 1988 (Appendix B). An appeal was subsequently taken by me to the United States Court of Appeals for the Fourth Circuit. This appeal was denied by the Court of Appeals' judgment of December 8, 1988 (Appendix D) and their opinion of the same date (Appendix A). On December 21, 1988 I filed with the Fourth Circuit a timely Appellant's Petition for Rehearing, with a Suggestion for Rehearing In Banc (see copy attached hereto). Strangely, the Fourth Circuit, by letter dated February 13, 1989 (see copy attached), which was in response to my letter to them of February 9, 1989, refused to

(footnote continued on next page)

Harris, Deputy Clerk in Charge of the Charlottesville Division, sent me deliberately misleading and fraudulent instructions on how to serve process on the defendant, Mr. William Berley [see page 5 of my letter dated July 28, 1988 to Mrs. Virginia Harris, which was received by her July 29th (part of Volume V of the Record on Appeal); see also paragraphs 2 and 3 of Amended Civil Case Filing Requirements for the Western District of Virginia, copy of which is attached hereto and to my letter of July 28, 1988]. These instructions stated unequivocally that if the defendant were served by mail, then a completed "Notice and Acknowledgment must be sub-

[3](footnote continued from preceding page) properly certify and send this Petition to the U.S. Supreme Court pursuant to Supreme Court Rule 19.1! Mr. John Graecen, Clerk of the Fourth Circuit, told me that he had been directly ordered by Francis J. Lorson, Chief Deputy Clerk of the Supreme Court, not to certify my Petition and send it to the Supreme Court, as required by law. Why? Why has the Supreme Court of the United States ordered the Fourth Circuit Court of Appeals to deliberately disobey a Supreme Court Rule [19.1]? This document is essential to an understanding of my case, and is only 19 pages, so there can hardly be a storage problem (that is the excuse I was given by Mr. Greacen - that there was a "storage probelem" in the Supreme Court). It appears as if the Supreme Court is attempting to hide from the evidence in this case.

mitted to the Clerk."

Now, as any lawyer knows, this is precisely the wrong way to serve a defendant in a federal case, because the defendant might refuse to fill out the Notice and Acknowledgment, and thereafter service by the plaintiff could become almost impossible! In fact, there are cases on record where service has become impossible because of this! And indeed, in this case, William Berley did refuse to sign the Notice and Acknowledgment I was fraudulently induced to send him by the United States District Court in Charlottesville, Virginia, and this caused me no end of troubles later on!

Furthermore, the written instructions I received from the Charlottesville District Court are a flat-out lie, because service in a federal diversity case, such as this one, can also be effected pursuant to Rule 4(e) of the Federal Rules of Civil Procedure, which does not require a

Notice and Acknowledgment to be sent at all!

If this misinformation was given to me deliberately by the district court then that would constitute a violation of 18 U.S.C. § 1503 (criminal obstruction of justice) and, possibly as well, 18 U.S.C. § 371 (conspiracy to obstruct justice).

Subsequently, the defendant William Berley filed with the United States District Court in Charlottesville a Motion to Dismiss for Lack of Personal Jurisdiction. Thereafter, I also filed with the district court a Plaintiff's Motion for Leave to Amend Complaint and to Enlarge Time [hereinafter "Motion to Amend"], which is Volume III, Numbers 22 and 23 of Record on Appeal, together with my First Amended Complaint (Volume III, Number 24). Strangely, Mrs. Mary Thurman, another Deputy Clerk in Charlottesville, refused

to sign for my Motion to Amend when I went to file it with the district court clerk's office, and I had to telephone Mrs. Joyce F. Witt, the Clerk for the Western District of Virginia in Roanoke, Virginia, in order to get Mrs. Thurman to file my Motion to Amend at all! Mrs. Thurman's only "excuse" was that she was doing something for Judge Michael at the time and would be too busy all day! This, of course, is illegal and is in direct violation of 28 U.S.C. § 452 and Rule 77(a) of the Federal Rules of Civil Procedure [Note: Federal court rules have the force of law. See Weil v. Neary, 278 U.S. 160, 169-170 (1929) and United States v. Gray, 438 F.2d 1160, 1163 (9th Cir. 1971)]. Furthermore, if the Deputy Clerk's refusal were made corruptly, it could also constitute criminal obstruction of justice pursuant to 18 U.S.C. § 1503.

On June 22, 1988, after five months of inaction, and apparently some prodding from the United States Supreme Court (I

had written the Clerk of the Supreme Court of the United States a letter dated May 2, 1988, together with a follow-up letter dated June 10, 1988, complaining about the inordinate delay), Judge Michael finally decided to hold a hearing on three pre-trial motions which were before him in this case. The third motion to be discussed was my Motion to Amend [see page 3 of Transcript of Hearing of June 22, 1988 (Volume IV of Record on Appeal); see also letter dated June 7, 1988 from Judge Michael, copy of which is attached hereto, which shows clearly that the Motion to Amend was on the agenda (please also note that Mrs. Virginia Harris, Deputy Clerk in Charge of the Charlottesville division, refused to add Judge Michael's letter of June 7th to the Record on Appeal, despite my written request to her to do so (see page 5 of my letter dated July 28, 1988 to Mrs. Harris, which was received by her July 29, 1988 - Volume V of Record on Appeal);

her refusal to add this letter to the Record on Appeal may involve an attempt on her part to "cover up" for Judge Michael's alleged official misconduct at the hearing (see next paragraph below)].

By simply not announcing during the hearing when the Motion to Amend was going to be discussed, Judge Michael tricked me into thinking that the Motion would be discussed later on in the hearing. Later never came. Judge Michael rendered his decision and left the courtroom before anyone, including myself, was given an opportunity to discuss the Motion.

At one point during the hearing (see Transcript, page 24, line 22, and Item 3 of CORRECTIONS ON THE TRANSCRIPT, which was annexed to Appellant's Informal Brief to the United States Court of Appeals for the Fourth Circuit, and a copy of which is attached hereto) I even asked Judge Michael point-blank, "Is that before us?"

(meaning my Motion to Amend), to which he replied, "No, I am going to deal with it on this complaint right now..."

As if that weren't enough, however, Judge Michael apparently gave instructions to his official court reporter, Ms. Sandra J. Miller, to fabricate the Transcript at that point and deliberately delete my question, "Is that before us?", so it would not look as if the judge had tried to trick me into holding off on my oral argument regarding that motion.

Could the deletion by Ms. Miller of an entire sentence been simply an accident? I don't think so, because the odds of a trained court reporter accidentally omitting an entire sentence from an official transcript aren't very great - probably less than one in a thousand. Furthermore, I have in my possession an electronic tape recording of the hearing made by my court reporting service, Statewide Court Reporters, Ltd., which was present at

the hearing (see pages 2-3 of Transcript). The sentence "Is that before us?" does appear on this tape, and I would be very happy to play this tape before this Court, if the Court so wishes. In addition, Ms. Miller admitted to me in my telephone conversation with her of July 21, 1988 [please see page 2 of my letter to Ms. Miller of July 28, 1988 (Volume V of Record on Appeal)] that she too had made an electronic tape recording of this hearing, which possibly could have aided her in her transcribing.

I wonder if this sort of thing is what the Founding Fathers had in mind when they considered "due process".

To continue, Judge Michael was nevertheless now in an awkward position. The decision he had rendered at the hearing on June 22nd did not contain a single word about my Motion to Amend, even though the Motion had been before him! Nor had he allowed any oral argument on it! In

other words, he had completely ignored it! So what's a judge to do? First he calls for a hearing on my Motion to Amend, and then he completely ignores it altogether! How does he work his way out of that one?

Simply. By ingeniously declaring the Motion to Amend to be "moot" in paragraph 4 of his Order of July 14, 1988 (Appendix B), Judge Michael, in effect, magically "wishes away" the motion! This directly violates Federal Rule 15(a) of Civil Procedure** and is, furthermore, an incorrect use of the term "moot". 13A Wright, Miller & Cooper, Federal Practice and Procedure § 3533, at 214 n.16 (1984 & Supp. 1988). This kind of legal reasoning has been seen only infrequently since the Middle Ages. It does not do credit to the federal judiciary.

Incredibly, the federal appeals court backed up Judge Michael's decision and order (see Appendices E and A, infra). I will not discuss their reasons for this.

**IMPORTANT NOTE: Defendant's Motion to Dismiss does not count as a "responsive pleading" within the meaning of Rule 15(a). 6 Wright & Miller, Federal Practice & Procedure § 1483, at 410 nn. 8-9 (1971 & Supp. 1988).

They did not have the courage to give any, even though I practically begged them to.** If I had to guess at their reasons, it would go something like this: "We know that we are wrong, but Mr. Laupot is not a lawyer, and no one will believe him anyway."

The first casualty in all this, of course, is due process, which somehow got lost along the way.

To make matters worse, Mrs. Virginia Harris refused to send the entire Record on Appeal up to the appeals court. In particular, she "accidentally" left out no fewer than 46 documents most favorable to my case (see Volume V of Record on Appeal, especially my letters to Mrs. Harris of July 26, July 28, and August 1, 1988, which were received by her on July 27, July 29, and August 1, 1988, respectively), particularly the documents pertaining to my Motion to Amend! It wasn't enough for Judge Michael to "wish away" my case.

**IMPORTANT NOTE: The U.S. Supreme Court does have the power to determine whether a question or an issue is actually "moot". Nixon v. Fitzgerald, 457 U.S. 731, 743 n.23, 102 S.Ct. 2690, 2698 n.23, 73 L.Ed.2d 349 (1982).

Apparently he and his court clerk had to try and make sure that all the documents were "wished away" too!

These matters would be more humorous if they didn't involve stock in business corporations owning Manhattan real estate presently worth billions of dollars and if they did not involve felonies committed by members of the judicial branch of the United States government.

REASONS FOR GRANTING THE PETITION

For all the above reasons, I respectfully submit I have been denied due process and equal protection of the laws under the fifth amendment to the United States Constitution. I have been denied an unbiased judge and appeals court. And the judges I have had have deliberately refused to allow me to amend my complaint, in violation of Rule 15(a) of the Federal Rules of Civil Procedure. In fact, the

various illegal acts committed by the United States District Court personnel in Charlottesville, Virginia can also be said to be overt acts in furtherance of defendants' alleged conspiracy committed in Virginia.

Nevertheless, the most bizarre thing about this case is that the primary legal issues involved were all settled by the courts over 200 years ago!

To discuss this further, let us begin by considering the first and most important question, namely, whether any overt acts in furtherance of the alleged conspiracy were committed by the defendant(s) in Virginia. To answer that, we must turn to the common law. But first let us note that in Virginia the rule of decision is determined in general by English common law [see Virginia Code Ann. § 1-10 (1987)], whenever "there is no Virginia law in point" [Long v. Vlasic Food Products Co., 439 F.2d 229, 231 (4th Circuit, 1971)].

As Virginia's highest court recently stated, "Virginia's jurisprudence is deeply rooted in the ancient precedents, procedures, and practices of the English system of justice. A substantial portion of '[t]he common law of England' and the 'writs, remedial and judicial, given by any statute or act of Parliament, made in aid of the common law' have been legislatively incorporated in the law of this Commonwealth. Code §§ 1-10 and -11." Oehl v. Oehl, 221 Va. 618, 623, 272 S.E.2d 441 (Va., 1980). See generally, Foster v. Commonwealth, 96 Va. 306, 31 S.E. 503 (1898).

Furthermore, federal law requires that federal courts sitting in diversity (as in the present case) apply state law as the rule of decision. See 28 U.S.C. § 1652 (Appendix F). See also Angel v. Bullington, 330 U.S. 183, 192 (1947) (stating that federal courts sitting in diversity "must follow State law and policy") and Erie R.R.

v. Tompkins, 304 U.S. 64, 78 (1937)(stating that "the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute [as in Virginia Code § 1-10] or by its highest court [e.g., Travelers Health Association v. Commonwealth, 188 Va. 877, 51 S.E.2d 263 (1949), affirmed, 339 U.S. 643, 70 S. Ct. 927, 94 L.E. 1154 (1950)] is not a matter of federal concern.")(emphasis added), cited with approval in Angel v. Bullington, 330 U.S. 183, 192. In Virginia, this ruling has very recently been specifically applied to Virginia Code § 1-10 by the Fourth Circuit Court of Appeals in their decision in Byrd v. Gate Petroleum Co., 845 F.2d 86, at 88 (1988). Thus, Virginia Code § 1-10 requires that the rule of decision in federal civil cases in Virginia, such as this one, is determined generally by English common law whenever there is

no Virginia law in point. This is federal law as well as Virginia law, and federal judges have no discretion to change this. Furthermore, "Virginia courts have applied this provision to justify reliance on contemporary as well as preenactment [i.e., prior to 1776] common law doctrines." Long v. Vlasic Food Products Co., 439 F.2d at 231; see also, Foster v. Commonwealth, 96 Va. 306, cited with approval in Long, 439 F.2d at 231.

Let us return, then, to the question of whether the conspirators have committed any overt acts in Virginia in furtherance of their criminal conspiracy to injure plaintiff in his business (Virginia Code § 18.2-499 and § 18.2-500), keeping in mind the fact that English common law will govern if there is no Virginia law in point.

Under English common law, it has long been the case (for over 200 years, at

least!)

> "[t]hat the delivery of . . . false vouchers [or any other false documents, by mail or post or by any other innocent party], with . . . fraudulent intent, in pursuance of a conspiracy for that purpose, is an offence in the place where the vouchers [or other false documents] were delivered, is a matter which cannot be doubted; though the conspiracy may have been in another place[,]"

and that

> "the persons who innocently delivered the vouchers [or other false documents, such as by mail] were mere instruments in [the] hands [of the conspirators] for that purpose; the crime of presenting their vouchers was exclusively their own, as the crime of administering poison through the medium of a person ignorant of its quality would be the crime of the person procuring it to be administered."

The King [Rex] v. Brisac and Scott, 4 East 164, 172, 102 Eng. Rep. 792, 14 Digest (Repl) 149 (K.B. 1804) [hereinafter

Brisac], cited with approval and applied in Director of Public Prosecutions v. Doot [1973, House of Lords], 1 All E.R. 940 passim, 57 Cr. App. R. 600 [hereinafter Doot]; see also, Regina [Queen] v. Baxter, [1972] 1 Q.B. 1 (Court of Appeal) and The King [Rex] v. Bowes, unreported decision (K.B. May 30, 1787), cited with approval in Brisac at 171 and in Doot, passim. In Brisac fraudulent documents were mailed by the defendants to Middlesex County in England, and, because of that, the defendants were able to be tried for criminal conspiracy in Middlesex County. Not only has the Brisac case never been overruled by any British court since 1804, but it has recently been affirmed by a unanimous decision of the British house of Lords (see Doot). Therefore, it remains the law of the land in Virginia, pursuant to Virginia Code § 1-10.

What is even more to the point, however, is that the principal holdings of Brisac have been further affirmed by Virginia's highest court (formerly called the Virginia Supreme Court of Appeals) in its unanimous 1949 decision in the case of Travelers Health Association v. Commonwealth, 188 Va. 877 [hereinafter Travelers]. In Travelers Virginia's highest court ruled that "actual presence in a state is not necessesary to make a person amenable to its laws for a crime committed there" (Id. at 891) and "he is . . . punishable at the place where the letter is received by the person to whom it is addressed [whether the unlawfulness of the communication of the communication through the post-office consists in its being a threatening letter . . . or a false pretence or fraudulent representation]" [Id., at 891, citing a well-known United States Supreme Court case In Re Palliser, 136 U.S. 257, 266-267 (1890)] (emphasis

added) (see also, page 8 of my Appellant's Petition for Rehearing, With a Suggestion for Rehearing In Banc, to the Fourth Circuit Court of Appeals, copy of which is attached hereto).

The holding of the Travelers Court was further applied specifically to the crime of conspiracy in Virginia by a unanimous 1986 decision of a three-judge panel of the Virginia Court of Appeals in Henry v. Commonwealth, 2 Va. App. 194, 342 S.E.2d 655, in which it was held that under Virginia's criminal venue statute, Va. Code Ann. § 19.2-244 (1983) (which states in part, "[e]xcept as otherwise provided by law, the prosecution of a criminal case shall be had in the county or city in which the offense was committed"), "the crime of conspiracy is deemed to have been committed in any city or county in which an act in furtherance of the conspiracy took place, as well as in the place where the conspiracy was entered

into" [2 Va. App. at 199, 342 S.E.2d at 657-658; see also Barber v. Commonwealth, 5 Va. App. 172, 181-182, 360 S.E.2d 888, 893 (Va. Ct. App. 1987) (citing with approval Henry, 2 Va. App. 194) and Va. Code Ann. § 18.2-22(3)(c) (1988)]. Furthermore, the Henry Court held that the receipt of documents sent by mail constitutes acts in furtherance of a criminal conspiracy - acts committed at the point of receipt of the mail ["The evidence of acts done in furtherance of the conspiracies within the City of Norfolk includes the letter received by Mrs. Moore in Norfolk . . ." (emphasis added). See Henry, 2 Va. App. at 199, 342 S.E.2d at 658]. Accord Hyde v. United States, 225 U.S. 347, 354, 361 (1912) ("[C]rime, even conspiracy, may be carried from one place to another in the 'mail pouches'"), cited with approval in Henry, 2 Va. App. 194; People v. Levy, 123 Misc. 845,

846-849, 206 N.Y.S. 857, 858-861 (County Ct. 1924) ("It is the question of where the mischief is delivered and not where it starts from that governs"); 18 U.S.C. § 3237(a)(Supp. IV 1982).

Therefore, I respectfully submit that these overt acts committed by the defendant(s) in furtherance of the conspiracy took place in Virginia within the meaning of Virginia Code § 19.2-244 (as upheld and interpreted by the Travelers Court, the Henry Court, and the Barber Court, as well as within the interpretation of the English common law as applied over the last 200 years, as exemplified by the Brisac and Doot Courts, and as required to be applied by Virginia Code § 1-10). This cannot be doubted. Nor, as we have seen, can it be doubted that federal courts are legally bound and required to observe and enforce the law of Virginia in this respect.

Having seen this, let us now continue with our analysis of personal jurisdiction, which works on a two-step basis. See Blue Ridge Bank v. Veribanc, Inc., 755 F.2d 371, 373 (4th Cir. 1985). First we may determine whether the excercise of personal jurisdiction complies with federal constitutional standards of due process and then we shall discuss herein whether there is statutory authority under Virginia's Long-Arm Statute [Virginia Code Ann. § 8.01-328.1 (1984 and Supp. 1988)] for the exercise of personal jurisdiction under the laws of Virginia.

As far as due process is concerned, it is quite clear that, according to a recent unanimous decision by the Supreme Court of the United States, the assertion of personal jurisdiction over the defendant(s) by the United States District Court in Charlottesville, Virginia would not violate their constitutional rights to

due process, because their criminal and tortious activities were intentionally directed against residents of the Commonwealth of Virginia. Calder v. Jones, 465 U.S. 783 (1984). This decision has of course been recognized by the Fourth Circuit Court of Appeals. See Pittsburgh Terminal Corp. v. Mid Allegheny Corp., 831 F.2d 522, 528 n.8 (1987).

The fascinating thing about the Calder case is that the Supreme Court found that the California courts had personal jurisdiction over not only a Florida-based magazine (The National Enquirer) which was being sued in California for publishing libelous matter in California but also over two reporters for the National Enquirer who were being sued individually, and who had never, or almost never, visited the State of California for any reason whatsoever! It was the maliciousness and purposefulness of the reporters' wrongful acts which took place in Florida but which were directed

at residents of California, which allowed the reporters to be sued in California without violating their Constitutional rights to due process under the fifth amendment. And obviously Calder is identical to the present case in this respect, because the wrongful and criminal activities of the defendant(s) in this case were maliciously and purposefully directed at the plaintiff and his immediate family, who have resided in Virginia continuously since 1977.

Having seen that it would not violate defendant(s) rights to due process to sue them in Virginia, let us now turn our attention to the second step in our two-part analysis, the determination of whether Virginia's long-arm statute authorizes the exercize of personal jurisdiction, although strictly speaking this should not be necessary in theory, since Virginia's long-arm statute and due

process considerations are coextensive [Laupot v. Berley, No. 88-2137, slip opinion at 4 (4th Cir. Dec. 8, 1988) (Appendix A)].

The relevant portions of Virginia's long-arm statute [Subsections (A)(3) and (A)(4)] read as follows:

§ 8.01-328.1 When personal jurisdiction over person may be exercised.

A. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:

. . .

3. Causing tortious injury by an act or omission in this Commonwealth;

4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth[.] (emphasis added).

First, therefore, let us see if the

defendant(s) have committed any "acts or omissions" in Virginia, pursuant to Subsection (A)(3).

As we have seen above, it is totally obvious that they have, since under Virginia law and English common law they have committed overt acts in furtherance of a criminal conspiracy in Virginia by mailing fraudulent documents into Virginia. And therefore, pursuant to Subsection (A)(3) of Virginia's long-arm statute, they have committed at least one wrongful act in Virginia. Furthermore, the wrongful acts complained of are not simply the overt acts in furtherance of the conspiracy, but the very act of engaging in a criminal conspiracy in Virginia, as defined by statute (Virginia Code § 18.2-499). This is because the cause of action on which I am suing, Virginia Code 18.2-500, is a statutory cause of action and requires merely that the defendant or defendants violate Section 18.2-499. Thus, it is the act of violating Section 18.2-499

in Virginia which constitutes the "act or omission" in Virginia pursuant to Virginia Code § 8.01-328.1(A)(3) (Virginia's long-arm statute). This is also true because Virginia's Code is required by statute to be read and construed as a whole. Virginia Code Ann. § 1-13 (1987); see also Marymount College v. Harris, 205 Va. 712, 717, 139 S.E.2d 43 (1964), quoting from and citing with approval Shepherd v. Box Company, 154 Va. 421, 425-426, 153 S.E. 649 (1930)("In the construction of its provisions, it is to be remembered that the Code itself is a single act of the legislature."). And see First National Bank v. Holland, 99 Va. 495, 504, 39 S.E. 126 (1901)("The Code is one act, prepared and adopted as such, and therefore in construing [a statute] we are not confined to the language of that section, but can look to other sections of the Code where the same terms are employed."). Therefore, under Virginia law, Virginia's Code is meant to

be internally consistent, and federal courts, as we have seen, are bound to follow Virginia law.

It is obvious, therefore, that the federal court in Charlottesville, Virginia does have personal jurisdiction over the defendant(s), and that is all the more reason why the federal judges should have allowed me to amend my Complaint as required by law. In fact, that is probably the reason why they did not allow me to amend my Complaint! Obviously that constitutes a denial of due process and equal protection under the fifth amendment.

Furthermore, the defendant(s) have also "engaged in a persistent course of conduct" in Virginia pursuant to Sub-section (A)(4) of Virginia's long-arm statute - first, because it is obvious that participating in a criminal con-spiracy in Virginia, as defined by

statute (Virginia Code § 18.2-499) constitutes a "persistent course of conduct" in Virginia within the meaning of § 8.01-328.1(A)(4) [please bear in mind that Virginia's Code, as we have seen, is meant to be taken as a whole and is meant to be internally consistent (Va. Code § 1-13), and, as well, it is meant to be interpreted plainly, from the plain meaning of the words, wherever possible. Richmond v. Sutherland, 114 Va. 688, 691, 77 S.E. 470 (1913)]; secondly, since defendants' conduct is criminal and wrongful and purposefully directed at the plaintiff and other residents of Virginia, therefore the "threshold level" of such conduct required to constitute a "persistent course of conduct" and bring it within the meaning of Subsection (A)(4) of Virginia's long-arm statute is not very great. First American First, Inc. v. National Association of Bank Women, 802 F.2d 1511, at 1515, 1516 n.3 (4th Circuit 1986).

Not only that, but the criminal conspiracy to maliciously injure plaintiff in his business does not constitute the only "persistent course of conduct" by defendant(s) in Virginia. In addition, defendant(s), by mailing fraudulent documents into Virginia, have committed, in Virginia, the criminal acts of "attempting to obtain money or signature, etc. by false pretenses" (Virginia Code Sections 18.2-26 and 18.2-178) [please bear in mind that the defendant(s) fraudulently attempted to obtain the signatures of myself and other Virginia residents on so-called Waivers of Citation, as part and parcel of their scheme to defraud us out of our inheritances - see pages 9-10 above]. Each attempt constitutes, in itself, a felony punishable by up to 5 years in a Virginia prison. There were a total of eight fraudulent Affidavits and other sworn documents mailed to my

mother, myself, and my sister in Virginia by the defendant(s) and alleged co-conspirators over a period of more than 2 years [see pages 8-9 above]! Obviously this constitutes a "persistent course of conduct" in Virginia within the meaning of subsection (A)(4) [see First American First, Inc. at 1515, 1516 n.3]! Please note that under Virginia law the attempts occurred in Virginia because the mailings were received in Virginia. See Travelers at 891, 51 S.E.2d at 268-269. Moreover, English common law (which must be applied pursuant to Virginia Code § 1-10 if there is no Virginia law in point) holds the same thing, and English common law on this point has most recently been decided by a unanimous British appeals court in the case of Regina [Queen] v. Baxter, [1972] 1 Q.B. 1 (Court of Appeal).

Thus, the defendant(s) have engaged in a "persistent course of conduct" in Virginia pursuant to Subsection (A)(4)

of Virginia's long-arm statute, for the reasons noted above.

Moreover, violations of Subsection (A)(4) by the defendant(s) would obviously bring them within reach of Virginia's long-arm statute in respect to all of my causes of action which I charged them with [i.e., fraud and deceit, conversion, misrepresentation, wrongful death, breach of fiduciary duty, prima facie tort, intentional infliction of mental and emotional distress, civil conspiracy, and conspiracy to wilfully and maliciously injure plaintiff in his business, pursuant to Virginia Code § 18.2-500(a)], since all of these aforementioned causes of action are based on wrongful acts committed at least in part outside the State of Virginia which caused tortious injury to me, the plaintiff, inside Virginia by causing me to sustain economic injury by depriving me of my inheritance. See, for instance, Humphreys v. Pierce, 512

F. Supp. 1321, at 1322, 1323 (W.D.Va. 1981).

To sum up, therefore, I will list each of my causes of action and put after it which subsection of Virginia's long-arm statute [(A)(3) or (A)(4)] applies to it in the present case:

1. Statutory conspiracy (Virginia Code §§ 18.2-499 and -500) - Subsections (A)(3) and (A)(4) [since overt acts in furtherance of the conspiracy were committed both inside and outside of the State of Virginia and therefore the conspiracy legally existed both inside of and outside of Virginia, and also because the conspiracy itself constituted "a persistent course of conduct" within the meaning of Subsection (A)(4)].

2. Civil conspiracy - Subsections (A)(3) and (A)(4) [for the same reasons as given above for the statutory conspiracy].

3. Fraud and deceit - Subsection (A)(4).

4. Conversion - Subsection (A)(4).

5. Misrepresentation - Subsection (A)(4).

6. Breach of fiduciary duty - Subsection (A)(4).

7. Wrongful death - Subsection (A)(4).

8. Prima facie tort - Subsection (A)(4).

9. Intentional infliction of mental and emotional distress - Subsection (A)(4).

This nearly ends our discussion of questions concerning personal jurisdiction in this case. The only case which I have been able to find in which the entire factual situation is nearly identical to this one is a unanimous decision of a three-judge panel of the California Court of Appeals entitled Quattrone v. Superior Court, 44 Cal. App. 3d 296, 118 Cal. Rptr. 548 (1975). In this case fraudulent information was supplied to a California plaintiff by a non-resident Pennsylvania defendant as part of an alleged conspiracy to defraud and injure the California plaintiff. Defendant had no other contact with the forum state of California. It was held that the defendant could be sued

in California and that his right to due process would not be violated, because "it is reasonable to exercise jurisdiction on the basis of the defendant intentionally causing 'effects in the state by an omission or act done elsewhere' whenever (a) the effects are of a nature 'that the State treats as exceptional and subjects to special regulation,' [Note: See, for instance, Virginia Code §§ 18.2-499 and -500] or (b) the defendant has, in connection with his causing such effects in the forum state, invoked the benefits and protections of its laws." Id., at 306 (emphasis added). In this case, of course, the "special regulation" which the State of Virginia treats as exceptional is Virginia Code §§ 18.2-499 and -500, which protect Virginia residents against non-residents who maliciously and deliberately interfere in their businesses. In fact, Virginia is one of only two States in the United States which provide its

citizens with such statutory protection [the other one being Wisconsin - see Wis. Stat. Ann. § 134.01 (West 1975 and Supp. 1988)]. Obviously, therefore, this type of special protection for residents of Virginia is of great concern to the Virginia state legislature. The holding in the Quattrone case was based on two previous holdings of the United States Supreme Court in McGee v. International Life Insurance Co., 355 U.S. 220 (1957) and Hanson v. Denckla, 357 U.S. 235 (1958). In the Hanson case the Supreme Court, in commenting on the factual situation in McGee and distinguishing it from the one in Hanson, said: "This case is also different from McGee in that there the State had enacted special legislation (Unauthorized Insurers Process Act) to exercise what McGee called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that

the State treats as exceptional and subjects to special regulation." (Id., at 252). The Quattrone Court commented (Quattrone at 305-306), "Taken together, these opinions [i.e., McGee and Hanson] indicate that where the forum state has manifested a special interest in controlling the effects by enacting special legislation with respect thereto, the exercise of jurisdiction based upon such effects is justified."

It will be noted that the Quattrone decision has been consistently upheld to date by all of California's courts, including its highest court, the California Supreme Court, as well as by various federal courts.

The Quattrone case is factually identical to mine in the following respects:

1. The cause of action involves the tort of civil conspiracy;

2. The defendant in Quattrone was a nonresident of the forum state of California who had never physically entered the forum state;

3. The defendant submitted fraudulent documents to the plaintiff;

4. California, as Virginia, had special laws to protect plaintiffs against that kind of behavior.

Furthermore, the Quattrone decision is based on two previous decisions of the United States Supreme Court (Hanson and McGee).

The Quattrone decision applies, of course, only to questions of due process, but since, as the Fourth Circuit has consistently ruled [see Laupot v. Berley, No. 88-2137, slip opinion at 4 (Dec. 8, 1988) (Appendix A)], "the Virginia [long-arm] statute is coextensive with the due process requirement of minimum contacts," then there can be no doubt that the

defendant(s) in the instant case would also be amenable to suit in Virginia pursuant to Virginia's long-arm statute.

This ends our discussion of questions of personal jurisdiction in this case. It is obvious that the defendant(s) in this case can be sued in Virginia, that the federal courts are legally obligated to recognize this fact, and that the federal courts are legally obligated to permit me to amend my complaint to so state. I am sorry to have to put this so bluntly, but as a matter of law it seems there can be no doubt about this.

Unfortunately, however, since the federal courts did not have the courage to state their reasons why they disagreed with these points, i have no choice but to discuss in detail every possible reason why my First Amended Complaint has merit. This is because the excuse could always be offered that the Fourth Circuit Court of Appeals refused to allow me to

amend my complaint because it appeared to them certain that I was not entitled to any relief under any state of facts which could be proved in support of my claim. See Fuhrer v. Fuhrer, 292 F.2d 140, 143 (7th Cir. 1961). Although it is absolutely untrue that my First Amended Complaint is "totally without merit", nevertheless I am going to list below each conceivable "objection" to it, followed by the corresponding answer to that objection. Thus:

1. "Objection": The alleged Statutory Conspiracy (and civil conspiracy) was formed long ago and far away.

Answer: Under English common law, "[i]f a general conspiracy exists, you may go into general evidence of its nature, and the conduct of its members, so as to implicate men who stand charged with acting upon the terms of it, years after those terms have been established,

and who may reside at a great distance from the place where the general plan is carried on[.]" Rex v. Hammond and Webb, 170 Eng. Rep. 508, 2 Esp. N.P.C. 719 (K.B. 1799), cited with approval in Mogul Steamship Co. v. M'Gregor, Gow & Co., 58 L.J.Q.B. 465 (1889).

2. "Objection": Virginia's criminal conspiracy statute, Va. Code § 18.2-500, doesn't apply to this case, since my grandfather's Estate and Trust, to which I am an heir and remainderman, respectively, did not own any businesses.

Answer: This is entirely untrue. The Estate and Trust of my grandfather, Max Berley, consisted almost exclusively of active New York State business corporations (e.g., BERLEY & CO., INC.; JANARD REALTY CORP.; 911 HOLDING CORP.; D & M ESTATES, INC.; 256 WEST 35TH STREET CORP., and 829 SEVENTH AVENUE CORP., as well as the partnership owning 478 Tenth Avenue, New York, N.Y. - please see

page 3 of my "Discrepancies in Defendant's Answering Brief" dated September 15, 1988, which is attached hereto and which is part of the Record on Appeal in this case - and many, many other business corporations, partnerships, etc., the names of which are unknown to me and which are alleged by me in my complaint and amended complaint to have been left out of my grandfather's Estate and Trust by the defendants). These business corporations and other entities were actively engaged in the ownership, leasing, managing, and brokering of real property in New York City. If these weren't businesses, what were they?

3. "Objection": Since plaintiff is a remainderman to a trust fund, he has only a future interest in these businesses and is therefore not covered under Virginia Code §§ 18.2-499 and -500.

Answer: Virginia Code § 18.2-500 is primarily intended to protect plaintiffs

against injuries to various property rights involving income-earning activities (e.g., reputation, trade, business, or profession), and it "focuses upon conduct directed at property, i.e., one's business[.]" Buschi v. Kirven, 775 F.2d 1240, 1259 (4th Cir. 1985). As such, therefore, the statute does not exclude a future, as opposed to a present, interest in a business. And, in general, please note that Virginia statutes are meant to be read in plain language, as we have seen, and that, furthermore, Virginia Code § 18.2-500 is remedial in nature and therefore is to be liberally construed. Becker v. Russek, 518 F. Supp. 1040, 1045 (W.D.Va. 1981); 17 Michie's Jurisprudence, Statutes, §§ 71, 72 (1979 and Supp. 1988).

4. "Objection": The businesses owned by plaintiff which are being protected by Virginia Code § 18.2-500 are located outside of Virginia, the forum State.

Answer: There is nothing in Virginia

Code §§ 18.2-499 and -500 which says or implies that the protected businesses must be located in Virginia. The only reported case on this matter is a Wisconsin case, Gerol v. Arena, 127 Wis. 2d 1, 377 N.W.2d 618 (Wis. Ct. App. 1985) (bear in mind that Virginia's conspiracy statute is exactly like, and was modeled after, Wisconsin's). In Gerol a Wisconsin defendant was found liable in a decision of a unanimous three-judge panel of a Wisconsin appeals court for conspiring to ruin a Wisconsin plaintiff's reputation and profession in Arizona (during which time the plaintiff was actually a resident of Arizona). Obviously this situation is analagous to the situation in the present case, since Arizona has no such criminal conspiracy statute and the action in the Gerol case was pursued under a Wisconsin statute.

5. "Objection": Plaintiff may own an interest in these businesses, but he never

operated any of them.

Answer: There is nothing in Virginia Code §§ 18.2-499 or -500 which in any way requires, or even implies, that a business be operated by a plaintiff (as opposed to merely owned - although had my grandfather not been allegedly murdered by the defendants, it is quite possible that I would be operating these businesses by now!).

6. "Objection": Plaintiff's future interest in the businesses left him by his grandfather has not yet vested, because, under the terms of his grandfather's Last Will and Testament, he cannot take his remainder interest in the testamentary trust fund until his mother dies. Therefore, plaintiff does not yet have a "property interest" which can be protected by Virginia Code §§ 18.2-499 and -500.

Answer: Under both Virginia law and New York State law, plaintiff's property

interest in his grandfather's Estate and testamentary Trust Fund vested as of the moment of his grandfather's death on January 11, 1958, since plaintiff's remainder interest was subject to no condition precedent, and was always ready to come into plaintiff's possession upon determination of the intermediate estates. See Mott v. National Bank of Commerce, 190 Va. 1006, 1010-11, 59 S.E.2d 97, 100 (1950); Mullins v. Simmons, 235 Va. 194, 196-97, 365 S.E.2d 771, 772 (1988)("In Virginia . . . the law favors early vesting of estates"); 16 Michie's Jurisprudence, Remainders, § 3, and Moore v. Littel, 41 N.Y. 66, 76 (1869).

7. "Objection": The original conspiracy to injure me in my business was consummated 30 years ago by the defendant(s) after they allegedly murdered my grandfather and stole my businesses away from me. What is going on now involves a different conspiracy by the defendant(s) simply to cover up their earlier wrongdoing.

Answer: This is wrong, since the defendant(s) and their decedents knew, prior to my grandfather's alleged murder in 1958, that they were named in his Will as lifetime Executors and Trustees of his Estate and Trust Fund. Therefore, their original conspiracy to murder my grandfather and injure me in my business must have included within it long-term plans for "covering up" their wrongdoings during their many anticipated years as Executors and Trustees. Indeed, one of the proposed new defendant(s), Alexander Berley, is an attorney at law who certainly has the expertise to plan a conspiracy like this well in advance.

8. "Objection": Under Virginia law, the cause of action in statutory conspiracy (Va. Code § 18.2-500) first accrued at the time of first damage to plaintiff. Esbaugh v. Amoco Oil Co., 234 Va. 74, 77, 360 S.E.2d 350 (1987). In this case that was on or about January 11, 1958, when plaintiff's grandfather was allegedly murdered and

plaintiff's interest in his grandfather's businesses first vested in plaintiff, and when those businesses were shortly thereafter converted to the use and benefit of the defendant(s). Under Virginia law the time limitation for filing suit on a cause of action based on statutory conspiracy is five years. Marmott v. Maryland Lumber Co., 807 F.2d 1180, 1185 (4th Cir. 1986). Therefore, plaintiff's time limitation in which to file suit expired on or about January 11, 1963.

Answer: Defendant(s) are equitably estopped from pleading statute of limitations, since, as alleged in my Complaint and the supporting documents thereto, they kept completely hidden from me any knowledge of my inheritance until 1984. See generally, Boykins Corp. v. Weldon, Inc., 211 Va. 81, 86, 266 S.E.2d 887, 890 (1980) and 7A Michie's Jurisprudence, Estoppel, § 16 (1985 and Supp. 1988).

9. "Objection": Virginia federal

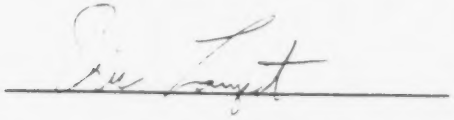
courts lack subject matter jurisdiction to interfere in a New York estate matter.

Answer: Where a lawsuit, such as the instant one, "is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other." Princess Lida v. Thompson, 305 U.S. 456, 466 (1939). See generally, Celentano v. Furer, 602 F.Supp. 777 (S.D.N.Y. 1985) and Giardina v. Fontana, 733 F.2d 1047 (2d Cir. 1984).

CONCLUSION

Since there does not seem to be any other conceivable objections as to why this case should not be tried in Virginia, I therefore respectfully request that, pursuant to Rule 17.1(a) of the Supreme Court, the Supreme Court grant certiorari in this case and conduct a thorough review of all the matters pertaining to this case.

Respectfully submitted,



Eric Laupot, Petitioner pro se
and one of the principal heirs
to the Estate of Max Berley
134-6 Ivy Drive
Charlottesville, Virginia 22901

Telephone: (804) 295-9540

Dated: April 6, 1989

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNPUBLISHED

No. 88-2137

ERIC LAUPOT

Plaintiff - Appellant

v.

WILLIAM BERLEY, Executor of the Estate of Harry Berley, Deceased

Defendant - Appellee

Appeal from the United States District Court for the Western District of Virginia, at Charlottesville. James H. Michael, Jr., District Judge. (C/A No. 88-8)

Submitted: November 7, 1988
Decided: December 8, 1988

Before WIDENER and SPROUSE, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Eric Laupot, Appellant Pro Se. Thomas E. Albro (SMITH, TAGGART, GIBSON & ALBRO), Robert J. Zastrow (ZASTROW [sic], STROOCK & LEVAN [sic]) for Appellee

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PER CURIAM:

Eric Laupot, a Virginia resident, appeals the district court's order dismissing his suit against the New York executor of the estate of a New York decedent for lack of personal jurisdiction. We affirm.

Laupot alleges that the decedent, a trustee of a trust fund of which Laupot is a remainderman, converted assets of the trust to his own use and filed fraudulent accountings regarding the assets in the trust with the New York County Surrogate's Court. Laupot also alleges that one of these allegedly fraudulent accounting was mailed to his sister in Virginia and received by his mother, a Virginia resident, who forwarded the accounting to his sister in either New York or California. Laupot received a copy of the accounting in Oregon, where he then resided; he later moved to Virginia. He subsequently re-

ceived in Virginia several other allegedly fraudulent mailings relating to the trust. Laupot contends that the Virginia courts have personal jurisdiction over the New York defendant because the accounting and other documents were mailed from New York to Virginia, where Laupot's mother resided and where Laupot now resides. We disagree.

Laupot rests his claim of personal jurisdiction on two subsections of the Virginia long-arm statute. The relevant section provides:

> When personal jurisdiction over person may be exercised.
>
> A. A court may exercise jurisdiction over a person, who acts directly or by an agent, as to a cause of action arising from the person's:
>
> . . .
>
> 3. Causing tortious injury by an act or omission in this Commonwealth;
>
> 4. Causing tortious injury in this Commonwealth by an act or omission out-

> side this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this Commonwealth[.]

Va. Code Ann. § 8.01-328.1(A)(3), (4) (1984). The first of these subsections does not apply because neither the defendant nor the defendant's decedent engaged in any sort of business activity in Virginia, resided in Virginia, or even, so far as the record shows, visited Virginia. Thus neither one could, under subsection 3, have ever acted or omitted to act in Virginia.

Laupot's contention that subsection 4 of the Virginia long-arm statute creates personal jurisdiction over the defendant rests on his assertion that the allegedly fraudulent accounting and other documents were mailed to Virginia. Laupot contends in part that the Virginia courts ought to take jurisdiction over his civil

suit because in a crininal mail fraud action in Virginia, the place where the accounting and other allegedly fraudulent documents were delivered, would be a proper venue for prosecution. 18 U.S.C. § 1341 (1970); Salinger v. Loisel, 265 U.S. 224 (1924). However, no private cause of action arises under this statute. Milburn v. Blackfrica Promotions, 392 F. Supp. 434 (S.D.N.Y. 1974). The mail fraud statute, then, is not an appropriate basis for personal jurisdiction over the defendant.

The reach of subsection 4 of the Virginia long-arm statute is coextensive with the due process requirement of minimum contacts. This Court recently held in Peanut Corp. of America v. Hollywood Brands, Inc., 696 F.2d 311 (1982):

> When jurisdiction is sought, pursuant to a long-arm statute, a dual analysis is normally required: first, it must be determined whether the statutory language, as a matter of contruction, purports to assert personal jurisdiction over the de-

> fendant; and second, assuming that the answer to the first question is affirmative, it must be determined whether the statutory assertion of personal jurisdiction is consonant with the Due Process Clause of the United States Constitution. Haynes v. James H. Carr, Inc., 427 F.2d 700, 703 (4th Cir. 1970). The two may be interrelated, however. The Virginia long-arm statute, as in the case of other state statutes as well, has been construed to extend in personam jurisdiction to the outmost perimeters of due process.

696 F.2d at 313; see also John G. Kolbe, Inc. v. Chromodern Chair Co., 211 Va. 736, 740, 180 S.E.2d 664, 667 (1971) ("It is manifest that the purpose of Virginia's long-arm statute is to assert jurisdiction over nonresidents who engage in some purposeful activity in this state to the extent permissible under the due process clause.") Because the Virginia statute is coextensive with the due process requirement of minimum contacts, Laupot's assertion of personal jurisdiction over the appellee will be analyzed under the constitutional

minimum contacts test.

Personal jurisdiction is not proper under subsection 4 because the only contact which defendant had with Virginia was the mailing of several documents, including the accounting. As the defendant did not avail himself of the privileges and benefits of Virginia law by virtue of these mailings, he could not reasonably expect to be haled into court in Virginia. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Chung v. NANA Development Corp., 783 F.2d 1124 (4th Cir. 1986). Therefore, the minimum contacts test has not been met and the Virginia courts do not have personal jurisdiction over the defendant. Cf. Hanson v. Denckla, 357 U.S. 235 (1958); see also Helicopteros Nacionales de Columbia v. Hall, 466 U.S. 408 (1984).

We find no error in the district court's dismissal for lack of personal jurisdiction. We dispense with oral argu-

ment because the dispositive issues have recently been decided authoritatively.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ERIC LAUPOT,) CIVIL ACTION NO. 88-0008-C

Plaintiff)

v.) O R D E R

WILLIAM BERLEY,)

Defendant) JUDGE JAMES H. MICHAEL, JR.

Entered July 14, 1988

Upon consideration of the defendant's motion to set aside entry of default and to dismiss for lack of jurisdiction, and for the reasons stated in open court on June 22, 1988, it is accordingly

ADJUDGED AND ORDERED

as follows:

1. The defendant's motion to set aside entry of default shall be, and it hereby is, granted, and accordingly, the clerk is hereby directed to set aside the entry of default.

2. The defendant's motion to dismiss

for lack of jurisdiction, shall be, and it hereby is, granted.

3. This action shall be, and it hereby is, dismissed with prejudice and stricken from the docket of this court.

4. As a result of this court's grant of the defendant's motion to dismiss for lack of jurisdiction, the plaintiff's motion to amend his complaint shall be, and it hereby is, rendered moot.

The clerk is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED: /s/ James H. Michael, Jr.
Judge

July 14, 1988
Date

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

ERIC LAUPOT, Plaintiff	:	
-vs-	:	Civil Action No. 88-0008-C
WILLIAM BERLEY, Executor of the Estate of Harry Berley, Deceased, Defendant	:	June 22, 1988 10:30 a.m.

TRANSCRIPT OF ORAL OPINION
DELIVERED IN OPEN COURT
ON JUNE 22, 1988
BY THE HONORABLE JAMES H. MICHAEL, JR.
UNITED STATES DISTRICT JUDGE

THE COURT: All right, gentlemen, the court has had the opportunity to review carefully what is extensive, might even describe the pleadings as voluminous pleadings in this case. And at this point the court

must accept as true the allegations of the complaint which bear on the question of personal jurisdiction. The court does accept as true for the purposes of this motion all of the allegations in the complaint, though many of them do not bear on the issue of personal jurisdiction.

It is obvious accepting all of these allegations as true that there are very serious problems involving this estate as it has been managed in New York. This does not mean that the court concludes that these serious problems exist. It is simply a conclusion drawn from the required acceptance of the allegations as true.

Whether there was murder, whether there was improper disposition of assets, whether there was drug dealing, so on, accepted as true indicates a very serious situation. But those facts do not bear on the issue which this court must decide, that is, the question of personal jurisdic-

tion.

Now, for the sake of making a decision on this issue, the court finds that there were two accountings mailed to and received by the mother of the plaintiff, and those accountings are alleged to be fraudulent. In argument there is the further that there were some citations which, from the court's experience with the Surrogate in New York, really amount to notices to affected parties originating with the Surrogate's Court, though prepared usually by counsel, but sent forward from the Surrogate's Court indicating that something is going to take place, some action is going to be taken or some report made or something of that nature.

This court had the opportunity and it was a real opportunity to appear before the Surrogate's Court in New York on a number of occasions many years ago principally through the activities of the late Forrest Hyde who practiced in New York and who later

was counsel to this court's private law firm.

In looking at the pleadings, there is some considerable doubt in the court's mind as to the standing of Mr. Eric Laupot to bring this suit. The injuries which are alleged to have occurred have occurred to his mother and to his sister. Now, that fact may be - - that question of standing may well be affected by the offer which Mr. Eric Laupot makes by way of a request for an amended motion - - amended complaint to assert that the accountings, fraudulent, alleged to be fraudulent, in fact, caused to Mr. Laupot personal injury.

But passing by that point and accepting that standing is appropriate here for Mr. Eric Laupot to bring forward this suit, the court then must turn to the question of personal jurisdiction. It is a question that has given the courts serious trouble over the years. Actually I suppose

the first case that really began definitively to address the issue was the International Shoe case, and of course, it was followed by a whole series of cases, the Volkswagen case, the Hanson against Dankla and so on.

In the evolution of this whole as it was affected by something that became very popular among the states, the so-called long arm statute. And as that long arm statute was adopted generally by the states, it brought about more and more litigation on just what was appropriate in terms of exercising jurisdiction under the long arm statute. And those cases ultimately were found to turn on a question essentially of what is due process.

Now, in the case at bar, the injury is asserted to be a tortious injury inflicted in the Commonwealth of Virginia by the receipt in the Commonwealth of these allegedly fraudulent accountings. Now, in looking at the long arm statute under which

Mr. Laupot has sought to assert jurisdiction, we find that Section 8.01-328.01 four bases for exercising personal jurisdiction under the state long arm act.

The significant ones are the third and the fourth. The third reads, "causing tortious injury by an act or omission in this Commonwealth." Now, the court does not find that any act or omission has occurred in this Commonwealth. Mr. Laupot undertakes to escape the language of 3 by relying on the federal mail fraud statute. Now, that federal mail fraud statute is Title 18 U. S. Code Section 1341.

Now, it is true that under that Section 1341 the point of receipt of a communication intended to further a fraud or a swindle confers jurisdiction, but it confers federal criminal jurisdiction. There is nothing in the language of Section 1341 that indicates that any private cause of action is intended by Congress in the

adoption of that statute.

And the rule is very clear that the only time one may find an implied private cause of action from a Congressional enactment is where, one, it is either, one, specifically spelled out in the statute as it is in a number of the securities and exchange fraud statutes or, two, where it must necessarily be implied from the language of the statute for the purpose which the statute seeks to achieve. And there is nothing in the statute from which this court can derive the notion that there was an implied cause of action, private cause of action, generated by the adoption of Section 1341.

The conclusion that the mail fraud statute does not confer a private cause of action really disposes of the possiblility of bringing this particular suit under the third heading of the state long arm statute because that says that the tortious injury

must be caused by an act or omission in the Commonwealth. There is no act or omission in this Commonwealth other than the receipt of the allegedly fraudulent communication from the trustee or more properly speaking from the Surrogate's Court of New York.

If the mail fraud statute, the federal mail fraud statute, does not confer a private right of action, and the court finds it does not, then the court must further find that the cause of action brought by Mr. Laupot in this case cannot lie under sub-part 3 of the long art statute of the Commonwealth.

That then leaves the fourth sub-part of the long arm statute and that reads as follows, "causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he -- that I assume is the person referred to in the first sentence - - if he regularly

does or solicits business or engages in any other persistent course of conduct or derisves substantial revenue from goods used or consumed or services rendered in this Commonwealth."

Now, the latter qualifications are in the disjunctive. Does the act of the defendant in this case regularly do or solicit business. There is nothing in the record that indicates that there is any doing or soliciting of business by the defendant in this Commonwealth.

Secondly, does the defendant, "engage in any other persistent course of conduct." The only evidence in the case as to this aspect of the case - - this aspect of the statute, is that mailings, few in number, are made to the plaintiff's mother and sister. The court is of opinion that that is not the "persistent course of conduct" which the statute envisioned.

The third disjunctive provision is

whether the defendant "derives substantial revenue from goods used or consumed or services rendered in this Commonwealth," and there is no evidence in the record that indicates that the defendant has received substantial revenue from any one of those aspects, goods used or consumed or services rendered. That being the case, it is doubtful to this court that there is any basis on which long arm jurisdiction can be asserted by the plaintiff in this case.

It's significant to note one other thing before we pass on, that is, the duty of the trustee. I'm going to refer to the defendant as fiduciary because it is utter confusion in the pleadings about whether they're trustees or executors or whatever, but I am just going to call them fiduciaries. This is a very significant point; the duty of the fiduciary is to his res to his trust. That's what it is. That is his duty as it

is stated in Michie's Jurisprudence, and this is universal law as far as this court knows across the nation.

The paramount duty of the trustee is to the preservation of the trust fund. Mr. Gerard Glenn, the late Gerard Glenn, used to teach us in my days in law school that primary and in many cases the sole duty of the trustee was to his res to his trust. And in fact, in many instances the trustee faithful to his res, his trust, must take action that is injurious or at least not beneficial to the beneficiaries of the trust.

As, for instance, where the fiduciary concludes that for whatever immediate reason a dividend or distribution must be deferred or delayed or omitted, that certainly is nothing the beneficiary is going to cheer about, and yet that duty may well be owed to the res to the trust. The court raises this point because it is significant that the trustee - - that the fiduciary's

duty is to his trust and not to the beneficiaries.

That is not to say that he may disregard or ignore the beneficiaries, of course not, but it is to say that the duty he owes is to perform properly as a fiduciary in relation to his trust. If there is injury flowing from the fraudulent account or the allegedly fraudulent accountings, it is an injury that flows to the res to the trust.

Now, if it is fraudulent and if the fraudulent proceeds are recovered, obviously the beneficiaries benefit. But it is still the fiduciary's duty, as Michie puts it, primary duty is to the res.

That being the case, the injury of which the complaint is made seems to this court more to be an injury to the trust than to the beneficiaries. It is true that they are misled by a fraudulent accounting, that they may be deprived of certain benefits by a fraudulent accounting, but it is

the trust which has been injured by the actions of the trustee which are improper as a fiduciary.

Now, it is on that bases that the court also finds that the injury caused is a tortious injury under the allegations in the State of New York because that's where the trust is.

There is a final point which I think is worthy of considerable scrutiny. There is before the court a case decided on the 23rd of October 1987. It is Pittsburgh Terminal Corporation against Mid Allegheny Corporation, et als. Its number is 86-1194 of the Court of Appeals for the 4th Circuit. So far as the court knows it is not yet in the court reporters, but it is so far as this court can find the latest pronouncement of the 4th Circuit on this subject. And as such, of course, it governs this court in ruling on this motion.

It's worthy of quoting from the opinion, and it is based - - this opinion,

that is, the Pittsburgh Terminal Corporation opinion is based principally on Burger King Corporation against Rudzewicz, which is 471 U.S. 462, 1985. They quote at length from Burger King as follows, "Once it has been decided that a defendant purposefully established minimum contacts within the forum state, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' Thus courts in appropriate cases may evaluate 'the burden on the defendant,' 'the forum state's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several states in furthering fundamental substantive social policies.'

"These considerations sometimes

serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities and forum residence [sic - should read: "at forum residents"] seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." That is from Burger King at 476-77.

In looking at this case - - Well, the court concludes from Pittsburgh Terminal Corporation and from Burger King that in a sense there is a form of balancing that must be done in these cases. So if we pass by the question of the injury being to the res, if we pass by the question of the contacts being totally minimal, then we come to this conclusion and that is to consider the language of Burger King in making the resolution of the case.

Now, from the record it is transparently apparent that all of the evidence relating to this matter other than such testimonial evidence as may be given by the mother, the sister and the plaintiff is located in New York. All of the records are there, all of the defendants are there and presumably all of those things are now if not in court at least - - in court in New York State - - at least in a position in which they can be presented in the courts of New York State.

"Fair play and substantial justice" is a subjective standard and one that this court has never found any really bright line for. But certainly the burden on the defendant can well be considered, and there are no bases for subjective judgment here. If the defendant were required to come into Virginia to defend on this case, it would mean moving the evidence from New York to this court and would impose what this court

believes to be a severe burden on the defendant.

And then you have the next item and that is the forum state's interest in adjudicating the dispute. Here the court finds it appropriate to look not only at the burden in the forum state's interest in adjudicating the dispute but also at New York's interest in adjudicating the dispute. Certainly as between the two, it would seem clear to this court that the interests of New York in protecting and preserving the integrity of its trusts and estates exceeds the interest of Virginia in trying to adjudicate a claim by beneficiaries of the trust.

New York has prospered over the years as a financial center by organizing and maintaining what at least in this court's experience has been an outstanding system of the administration of trusts and estates, and in fact, much of the financial markets,

financial activities in New York are centered in the city there and deal specifically with this. And the reputation of New York to maintain proper trusts and estates with the integrity that must go with such estates seems to this court to give to New York a far greater interest in adjudicating the dispute than is given to Virginia by the fact that there is a contest between three beneficiaries, one potential beneficiary, two actual beneficiaries and the defendant.

Now, the plaintiff's interest in obtaining convenient and effective relief certainly would be a factor which would relate to maintaining the case in this court because it certainly would be convenient to the plaintiff. Whether it could be effective is another matter. That depends a great deal on how far this court could go in trying to manage or to direct the activites of a trustee appointed under New York law and subject to New York

law.

The next factor is the interstate judicial system's interest this obtaining the most efficient resolution of controversies. Here again the court finds that the interests of New York state far exceed those of Virginia in obtaining "the most efficient resolution of the controversy." If this matter were brought to trial in New York State, then New York State has before it not only its law governing the question of administration of estates and trusts, it also has personal jurisdiction over the particular trustees, particular fiduciaries and would most definitely be interested in an efficient resolution of this particular controversy.

Virginia's interest would be in resolving the controversy between the plaintiff, his mother and his sister and a trustee. New York's interest are much broader, as this court sees it under the allegations of the complaint, in relation to missapropriation of moneys, misconveyance

of real property and so on.

The last factor is the shared interest of the several states in furthering fundamental substantive social policies. Now, if the court wanted to write a treatise on that, I think that would open the gate to let it be done because what are fundamental substantive social policies. Well, the court would identify them at least in the main as being social policies which lead to the prompt and efficient resolution of disputes within the context of the Constitution, the long arm statute and various cases which have come down relating to the exercise of personal jurisdiction to which the court adverted earlier in this bench opinion.

In looking at those fundamental substantive social policies, the court certainly would find that Virginia shares with New York a strong interest in furthering those policies. In doing so, it would

seem to this court that the stronger interest in furthering these social policies lies with New York rather than with Virginia. While Virginia unquestionably has that interest, the facts of this case indicate to this court that the interests of New York in that respect in respect to fundamental substantive social policies would exceed those by far of Virginia.

The court has taken more time than is customary to deliver this opinion because it is a serious matter, and to be blunt the court looked with some considerable care at the papers of both parties, particularly those of Mr. Laupot, because of the feeling that there is something that needs to be carefully explored in looking at those allegations. I'm not saying they're true, Mr. Laupot, you understand that. But you have made out a case that gives this court concern.

Unfortunately, for that interest the court must apply the law as he finds it.

And the analysis which the court has stated here on the record is such that I'm forced to grant the motion to dismiss. It's not the happiest decision the court has come to, but I'm required to administer the law as it appears and not as I might like it to be. For the reasons indicated the court will grant the motion to dismiss the complaint. Is there anything else we can do in the case?

MR. LAUPOT: Yes, Your Honor. There is a motion to amend, and my understanding was - - Oh, I'm sorry - - my understanding was that I would get a chance to discuss the personal jurisdiction concerning the complaint - - concerning the amended complaint, the two charges of conspiracy. My understanding was that would be discussed after this. So I held off on my argument regarding that.

THE COURT: Well, I asked you, Mr. Laupot, if you wished to say anything further and you told me no.

MR. LAUPOT: Yes, in regards to that motion.

THE COURT: You told me that you expected to add two things to your amended complaint.

MR. LAUPOT: [No,] I thought you were asking me if I wanted to add something else besides the amended complaint [Note: The word "No" was deleted by the Official Court Reporter, Sandra J. Miller, apparently deliberately].

THE COURT: You may file what motion you choose asking me to vacate, amend this ruling, but the ruling stands as I have made it, Mr. Laupot.

MR. LAUPOT: Thank you, Your Honor.

THE COURT: Is there anything further we can do in the case?

MR. ALBRO: Nothing for the defendant, Your Honor.

THE COURT: Mr. Laupot, anything further on this issue?

MR. LAUPOT: No, Your Honor.

THE COURT: All right, then we will recess.

The hearing concluded at this time

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 88-2137

ERIC LAUPOT

Plaintiff-Appellant

v.

WILLIAM BERLEY, Executor of the Estate of Harry Berley, Deceased

Defendant - Appellee

Entered: December 8, 1988

APPEAL FROM the United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel [sic in the original - actually

this cause was not argued by counsel in the United States Court of Appeals].

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Greacen
CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-2137

Entered: January 6, 1989

ERIC LAUPOT,

Plaintiff-Appellant

versus

WILLIAM BERLEY, etc., [sic]

Defendant-Appellee.

O R D E R

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion

it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and it hereby is, denied.

With the concurrences of Judge Sprouse and Judge Butzner.

/s/ H.E. Widener, Jr.

For the Court

PERTINENT TEXT OF CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth Amendment to the Constitution of the United States, which provides in pertinent part:

"No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

2. 18 U.S.C. § 371 (1982) provides in pertinent part:

"If two more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

3. 18 U.S.C. § 1503 (1982) provides in pertinent part:

"Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors

to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

4. 18 U.S.C. § 3237(a) provides in pertinent part:

"Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.

Any offense involving the use of the mails . . . is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves."

5. 28 U.S.C. § 452 provides in pertinent part:

"All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders."

6. 28 U.S.C. § 1254(1) provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree..."

7. 28 U.S.C. § 1332 (1982) provides in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between -
(1) citizens of different States..."

8. 28 U.S.C. § 1652 (1982) provides in pertinent part:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

9. Virginia Code § 1-10 provides:

"The common law of England, insofar as it is not repugnant to the principles of the Bill of Rights and constitution of this Commonwealth, shall continue in full force within the same, and be the rule of decision, except as altered by the General Assembly."

10. Virginia Code § 1-13 provides:

"In the construction of this Code and of all statutes, the rules shall be observed as set forth in the following sections, unless the construction would be inconsistent with the manifest intention of the General Assembly."

11. Virginia Code § 18.2-26

provides in pertinent part:

"Every person who attempts to commit an offense which is a noncapital felony shall be punished as follows:

(1) . . .
(2) . . .
(3) If the felony attempted is punishable by a maximum punishment of less than twenty years' imprisonment, an attempt thereat shall be punishable as Class 6 felony."

12. Virginia Code § 18.2-178

provides:

"If any person obtain, by any false pretense or token, from any person, with intent to defraud, money or other property which may be the subject of larceny, he shall be deemed guilty of larceny thereof; or if he obtain, by any false pretense or token, with such intent, the signature of any person to a writing, the false making whereof would be forgery, he shall be guilty of a Class 4 felony."

13. Virginia Code § 18.2-499

provides in pertinent part:

"(a) Any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully and maliciously injuring another in his reputation, trade, business or professin by any means whatever, . . . shall be jointly and severally guilty of a Class 3 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500." (emphasis added).

14. Virginia Code § 18.2-500 provides in pertinent part:

"(a) Any person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel; and without limiting the generality of the term, "damages" shall include loss of profits."

15. Wisconsin Stat. § 134.01 provides:

"Any 2 or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of wilfully or maliciously injuring another in his reputatin, trade, business or profession by any means whatever, or for the purpose of maliciously compelling another to do or perform any act against his will, or preventing or hindering another from doing or performing any lawful act shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding $500."

16. Federal rule of civil Procedure 4(e) provides in pertinent part:

". . . Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons . . . upon a party not an inhabitant of or found within the state . . . service may . . . be made under the circumstances and in the manner prescribed in the statute or rule."

17. Fed. R. Civ. Proc. 15(a) provides in pertinent part:

"(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . ."

18. Fed. R. Civ. Proc. 77(a) provides:

"(a) District Courts Always Open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules."

19. Rule 17.1(a) of the Supreme Court of the United States provides in pertinent part:

".1 A review on writ of certiorari . . . will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter . . . or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." (emphasis added).